Supreme Court, U.S.
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No. 98-1089

In The

Supreme Court of the United States

October Term, 1998

HAMILTON AMUSEMENT CENTER t/a VIDEO EXPRESS,
L.O.J., INC. t/a THE EMPORIUM,
PINCO, INC. t/a CAMELOT BOOK STORE, and
CRESCENDO BOOKS, INC. t/a CARNIVAL BOOKS,

Petitioners,

vs.

PETER VERNIERO, Attorney General for the State of New Jersey
and THE STATE OF NEW JERSEY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE STATE OF NEW JERSEY

REPLY TO RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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PARENT AND SUBSIDIARY COMPANIES

Petitioners have no parent or subsidiary companies to be listed pursuant to Rule 29.6 of the Rules of this Court.

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POINT I

THE STATE FAILED TO DEMONSTRATE THE REQUISITE SUBSTANTIAL GOVERNMENTAL INTEREST IN ITS SIGNAGE STATUTE'S RESTRICTIONS ON SPEECH IN ITS LEGISLATURE OR THE TRIAL COURT.

Petitioners argued in their Petition for Certiorari [the "Petition"] that the subject adult sign ordinance, New Jersey Statutes Annotated ["N.J.S.A."] 2C:34-7c, is a content-based restriction on non-obscene speech which must be subject to strict scrutiny analysis. As such, it could only be sustained by a compelling state interest using the least restrictive means.[1] However, even if the statute was found to be content-neutral, under City of Renton v. Playtime Theatres, Inc., 475 U.S. 41 (1986), the State would still be required to demonstrate, at a minimum, a substantial governmental interest in its restrictions (475 U.S. at 50).

Petitioners assert that in the First Amendment arena, Renton specifically requires that proof of a substantial governmental interest be made by evidence submitted to and relied upon the legislature itself in enacting the statute (475 U.S. at 51-52). Notwithstanding this Court's direction, some lower courts have nevertheless allowed the requisite evidentiary submission to be made in the trial court in the first instance, rather than in the legislature pre-enactment. Phillips v. Borough of Keyport, 107 F.3d 164, 178 (3d Cir.) (en banc), cert. denied, -- U.S. --, 118 S.Ct. 336 (1997). This creates a significant conflict which should be resolved

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[1]See, e.g., Sable Communications of California, Inc. v. F.C.C., 492 U.S. 115, 126 (1989).

by this Court. However, petitioners are unaware of, and respondents do not cite, other authority setting a new standard, allowing evidence of a substantial governmental interest to be introduced for the first time at the appellate court level.

Here, insufficient evidentiary justification for the State's restrictions on the exterior signage of sexually oriented businesses was introduced before the legislature in enacting N.J.S.A. 2C:34-7c. As recognized by the State Supreme Court, unlike the city in Renton, the New Jersey legislature did not place in the Record any studies showing the purported secondary effects of adult businesses; nor is there evidence it relied on any such studies or court decisions (A-17). Rather, the only pre-enactment legislative evidence was a position report by the Concerned Women for America which did not address signage, traffic safety or minors (A-19 to A-20); and a diatribe by the statute's sponsor attacking adult businesses as "perverted establishments" with "sordid activities" (A-55), without offering evidentiary support for her conclusions (A-20).

Ultimately, the State was permitted by the Appellate Division to supplement its Record in an attempt to articulate a substantial interest in restricting speech by adding the legislative history of N.J.S.A. 2C:33-12.2, a separate companion statute (A-21; Resp. Brief, p.2). Respondents failed to introduce this additional material in the trial court (Resp. Brief, p.3), which would have provided petitioners the opportunity for adversarial review. Rather, they were permitted to "expand the appellate record" (Resp. Brief, p.3). Thus, respondents first submitted this legislative history of a separate statute to the intermediate appellate court (A-21;

Resp. Brief, p.5); the State Supreme Court similarly took judicial notice thereof (A-21).

Petitioners have strenuously argued in their Petition that respondents did not come close to establishing evidentiary support for their restrictions on speech, either pre-enactment before the legislature, or later in the trial court, as required by Renton and First Amendment jurisprudence (Petition, pp.9-14). Respondents, however, mistakenly contend that this argument is foreclosed because petitioners failed to assert it before the State Supreme Court until they moved for reconsideration after that court's decision (Resp. Brief, pp.6, 10). That contention is based upon an erroneous reading of the New Jersey Court Rules.

Respondents concede that petitioners devoted several pages of their Appellate Division Brief to protesting the "expansion of the appellate record" (Resp. Brief, p.11). Of course, such an argument in a brief, though on First Amendment grounds, is not the same as their being able to refute the additional material at an adversarial hearing in the trial court. Nevertheless, the argument against augmentation of the Record clearly was made by petitioners before the Appellate Division.

After they were unsuccessful in the intermediate appellate court, petitioners obtained certification of their appeal in the State Supreme Court. Under New Jersey Court Rule 2:12-11, an appeal to the State Supreme Court normally is "submitted on the briefs, appendices and transcript filed

with the Appellate Division" below.[2] Thus, contrary to respondents' surprising contention that petitioners first raised this issue on their motion for reconsideration (Resp. Brief, pp. 6, 10), petitioners' attack on the expansion of the appellate Record to include matters not in front of the trial court was clearly before the State Supreme Court prior to its decision sought to be reviewed herein. This is further evidenced by the opinion of that court discussing and accepting the expansion of the Record to include the legislative history of N.J.S.A. 2C:33-12.2 (A-21 to A-22).

Respondents attempt to attack petitioners' asserted questioning of Renton's applicability in this case (Resp. Brief, pp.7-8). That attempt is surprising. Petitioners do not question the general applicability of Renton in a First Amendment context. However, they do note that factually Renton dealt with locational restrictions on adult businesses, not an attempt to regulate the content of speech. The instant statute, to the contrary, does not restrict the location of adult-oriented businesses, but instead directly regulates the contents of their exterior signage.

Next, respondents raise the counterfeit argument that petitioners are attacking the factual findings of the State Supreme Court that a sufficient evidentiary showing was made to justify the State's restrictions on speech (Resp. Brief, pp.8-9). That contention is a straw man.

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[2]The full text of New Jersey Court Rule 2:12-11 is reproduced in the Appendix to this Reply Brief. In fact, petitioners motion to submit a further Brief to the State Supreme Court was denied.

While petitioners certainly dispute that respondents have demonstrated a substantial governmental interest within the Renton mandate, that is clearly not the thrust of their argument. Rather, petitioners assert that in the context of a restriction on their speech, the First Amendment requires that the State legislature had evidentiary support therefor prior to enactment of N.J.S.A. 2C:34-7c -- or that this was at least demonstrated before the trial court herein. That unquestionably did not occur (A-21).

Instead, respondents attempt to make a belated showing that the State Supreme Court itself relied upon "legislative pre-enactment evidence" (Resp. Brief, p.9). Petitioners maintain that any such factual reliance by the State's highest court is irrelevant; Renton requires reliance by the legislature itself (475 U.S. at 51-52).[3] In any event, such evidence must concern the signage statute in issue (N.J.S.A. 2C:34-7c), not the legislative history of a "related" but independent statute (N.J.S.A. 2C:33-12.2), as here (A-21).

Respondents' final argument on this issue is that as an independent ground under state law, the New Jersey appellate courts have the right to expand the appellate Record to consider legislative matters outside the trial court Record via New Jersey Court Rule 2:10-5 (Resp. Brief, pp.10-11). This argument similarly fails.

If we were here considering a matter solely under New Jersey law, that State's internal procedural rules would

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[3]Respondents concede the existence of a split in authority as to whether Renton requires pre-enactment evidence of a substantial governmental interest (Resp. Brief, p.9).

govern. However, in this instance we are concerned with the requirements of the First Amendment to the United States Constitution. As bindingly construed by this Court in Renton, in restricting petitioners' speech New Jersey was required to rely upon evidence of a substantial governmental interest pre-enactment before the legislature (475 U.S. at 51-52), and certainly not for the first time before its appellate courts after failing to introduce it at trial.

Moreover, that the legislative history of the "companion statute," N.J.S.A. 2C:33-12.2, may have been introduced before the trial court in Chez Sez VIII, Inc. v. Poritz, 297 N.J.Super 331, 688 A2d 119, certif. denied, 149 N.J. 409, 694 A2d 194, cert. denied, -- U.S. --, 118 S.Ct. 337 (1997) [Resp. Brief, p.11], is of no moment. This case concerns only the validity of N.J.S.A. 2C:34-7c.

POINT II

THIS CASE IS AN APPROPRIATE VEHICLE FOR DETERMINING WHETHER COMMERCIAL SPEECH IS ENTITLED TO FULL FIRST AMENDMENT PROTECTION.

It was previously demonstrated in Point II of the Petition that there is substantial controversy concerning the current status of protection for commercial speech arising from the Court's jurisprudence. While Central Hudson Gas & Elec. Corp. v. Public Service Com'n., 447 U.S. 557 (1980), and its "intermediate scrutiny" test remain current law, the rationale of that decision has been questioned by lower courts and commentators, as well as numerous Justices of this Court (Petition, pp.16-18).

As recognized by respondents (Brief, p.13), this Term two circuit court decisions applying the "commercial-speech doctrine" and intermediate level scrutiny have had petitions for certiorari granted. United Reporting Pub. Corp. v. California Highway Patrol, 146 F.3d 1133 (9th Cir. 1998), cert. granted, 67 U.S.L.W. 3468 (January 25, 1999); Greater New Orleans Broadcasting Ass'n v. United States, 149 F.3d 334 (5th Cir. 1998), cert. granted, 67 U.S.L.W. 3456 (January 15, 1999). Respondents argue that those cases are sufficient to allow the Court to abandon or revise the doctrine if it will (Resp. Brief, p.13).

Respondents' argument is unpersuasive. The fact that in the last two months two cases concerning commercial speech and the First Amendment have already been deemed of sufficient import to be granted plenary review by this Court underscores the national significance of this issue. The instant case, questioning whether a state's restrictions on the contents of exterior signage merely because of the adult-content of the underlying business may survive, is of national significance as well.

Further, as reported in the United States Law Week, neither the United Reporting[4] nor the Greater New Orleans[5]

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[4]"Question presented: Does government violate First Amendment when it releases arrestees' and crime victims' records but forbids their commercial use?" (67 U.S.L.W. at 3342)

[5]"Question presented: May federal government, consistent with First Amendment, undertake to suppress lawful casino gaming by banning truthful, nonmisleading broadcast advertising for such gaming?" (67 U.S.L.W. at

cases present a question expressly examining the applicability of intermediate scrutiny for truthful commercial speech, as does the instant Petition (p.i).

Respondents contend that this case is of lesser importance because the State Supreme Court relied upon both Renton and commercial speech analysis (Resp. Brief, p.13), and that Renton is not under attack. However, the State Supreme Court made clear that it was relying on the Central Hudson limited protection analysis for commercial speech (A-11 to A-13). If this Court should now determine that full First Amendment protection is warranted for commercial speech, then an exacting strict scrutiny analysis would be required. See, e.g., Turner Broadcasting System, Inc. v. F.C.C., 512 U.S. 622, 642 (1994). In such instance, the New Jersey signage statute should be stricken, or at a minimum, the matter remanded to the State Supreme Court for a proper analysis.[6]

Moreover, with regard to Renton, the signage statute's sponsor specifically indicated a concern about children being exposed to adult businesses and their "sordid activities" (A-19 to A-20). To the extent the purpose of the signage restrictions on speech is to insulate minors from the primary effects of adult entertainment, then like the Communications Decency Act, it would be content-based and subject to full strict scrutiny analysis, rather than an analysis

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[6]Alternatively, the Court may choose to delay its decision on the instant Petition for Certiorari until it can decide the pending commercial speech cases for which it has already granted review this Term.

under Renton. Reno v. American Civil Liberties Union, -- U.S. --, 117 S.Ct. 2329, 2342-43 (1997).

POINT III

THE SUBJECT NEW JERSEY STATUTE IS IMPERMISSIBLY VAGUE.

It is uncontrovertible that under the First Amendment a statute -- and especially one with criminal penalties, as here -- must not be so vague that an average person cannot discern its meaning. Coates v. Cincinnati, 402 U.S. 611 (1971). The subject ordinance, N.J.S.A. 2C:34-7c, allows adult-oriented businesses to post one "identification" sign. Apparently recognizing the constitutional infirmity of such a law, the state courts have attempted a salvage operation using "judicial surgery" (A-36). Thus, although the statute itself contains no such guidance, the courts below held that such a sign may lawfully include the business' name, street address, phone number, hours of operation, and the nature of its activities (A-37, A-79). No direction is given, however, as to whether a specific designation of items sold may be set forth, or a picture or logo design used on the sign.

Respondents argue that petitioners have been given enough guidance to conform their conduct to the statute (Resp. Brief, p.14). However, violation of the statute carries criminal sanctions, and petitioners violate the legislation at their peril. This can only lead to an "increased deterrent effect," and the "'risk of discriminatory enforcement of vague regulations'" by local police. Reno v. American Civil Liberties Union, -- U.S. --, 117 S.Ct. 2329, 2345 (1997).

The state courts' attempts to save the subject vague signage restrictions should not be allowed.

CONCLUSION

This Court should not condone the State's attempts to evade the Renton requirement that to restrict speech, evidence of a substantial governmental interest therein must be presented to the legislature pre-enactment. Further, full strict scrutiny analysis should be applied to restrictions on commercial, as well as political, speech.

For the foregoing reasons, and as previously set forth, petitioners request that the Court grant their Petition for a Writ of Certiorari.

Respectfully submitted,

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APPENDIX

APPENDIX TO THE PETITIONERS' REPLY BRIEF

New Jersey Court Rule 2:12-11

> If certification is granted, the matter shall be deemed pending on appeal in the Supreme Court and the petitioner's entire case shall be before the Supreme Court for review unless the Supreme Court otherwise orders on its own motion or on the motion of a party which shall be included in the petition or in the respondent's brief in answer thereto. The respondent may seek affirmative relief only by cross petition for certification. Further proceedings shall be had as provided for on appeals as of right, except that the appeal shall be submitted on the briefs, appendices and transcript filed with the Appellate Division and except that, in appropriate cases, the Supreme Court may render a decision without argument. Further briefs on the appeal may be filed only on order and in accordance with the schedule set forth therein. Application for permission to file further briefs shall be in the form of a motion.